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80-1842

NO.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

DANIEL BIFIELD,

Petitioner

-vs-

UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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April , 1981

QUESTION PRESENTED

Should certiorari be granted to resolve a dispute among the circuit courts concerning whether a competency examination is mandatory under 18 U.S.C. §4244 when the district court receives evidence that a criminal defendant has sustained recent, serious and untreated head injuries?

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PETITION FOR A WRIT OF CERTIORARI TO
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The petitioner, Daniel Bifield, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on April 6, 1981.

OPINION BELOW

The opinion of the United States Court of Appeals for the Second Circuit is unreported, but appears in the Appendix hereto. The judgment of the United States District Court for the District of Connecticut appears in the Appendix hereto.

JURISDICTION

The opinion of the United States Court of Appeals for the Second Circuit was entered on April 6, 1981, and this petition for a writ of certiorari was filed within 60 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

18 U.S.C. Appendix §1202:

(a) Any person who --

(1) has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony,

* * *

and who receives, possesses, or transports in commerce or affecting commerce, after

the date of enactment of this Act, any firearm shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

18 U.S.C. §4244:

Whenever after arrest and prior to the imposition of sentence or prior to the expiration of any period of probation the United States Attorney has reasonable cause to believe that a person charged with an offense against the United States may be presently insane or otherwise so mentally incompetent as to be unable to understand the proceedings against him or properly to assist in his own defense, he shall file a motion for a judicial determination of such mental competency of the accused, setting forth the ground for such belief with the trial court in which proceedings are pending. Upon such a motion or upon a similar motion in behalf of the accused, or upon its own motion, the court shall cause the accused, whether or not previously admitted to bail, to be examined as to his mental condition by at least one qualified psychiatrist, who shall report to the court. For the purpose of the

examination the court may order the accused committed for such reasonable period as the court may determine to a suitable hospital or other facility to be designated by the court. If the report of the psychiatrist indicates a state of present insanity or such mental incompetency in the accused, the court shall hold a hearing, upon due notice, at which evidence as to the mental condition of the accused may be submitted, including that of the reporting psychiatrist, and make a finding with respect thereto. No statement made by the accused in the course of any examination into his sanity or mental competency provided for by this section, whether the examination shall be with or without the consent of the accused, shall be admitted in evidence against the accused on the issue of guilt in any criminal proceeding. A finding by the judge that the accused is mentally competent to stand trial shall in no way prejudice the accused in a plea of insanity as a defense to the crime charged; such finding shall not be introduced in evidence on that issue nor otherwise be brought to the notice of the jury.

STATEMENT OF THE CASE

Following a joint trial with Susan Corin Bouton before a jury in the United States District Court for the District of Connecticut (Jose A. Cabranes, J.), Daniel Bifield was convicted of possessing a firearm in or affecting commerce after having been convicted of a felony, in violation of 18 U.S.C. Appendix §1202(a)(1). His conviction was affirmed by a panel of the United States Court of Appeals for the Second Circuit on April 6, 1981, and he is currently serving a two-year prison sentence.

On the morning his trial was scheduled to begin, Mr. Bifield orally moved, pro se, for a postponement of his trial to enable him to retain new counsel. During his comments to the court, he noted that "I've been confused, and I have a lot of pressure in my brain, a lot of things in my brain, a lot of things have happened to me." A recess was called, and after a discussion with Mr. Bifield defense counsel informed the court that Mr. Bifield had recently sustained a head injury and as a consequence appeared to counsel to be con-

fused and unable to understand the proceedings. Although not expressly invoking the provisions of 18 U.S.C. §4244, defense counsel requested a 24-hour postponement of the trial for purposes of a medical evaluation, rest and consultation with other counsel.

Defense counsel informed the court that a few days earlier a state court judge, having observed Mr. Bifield in court, had "ordered from the bench that because of visible injuries he be given medical attention. He wasn't given that attention. He was seen by someone in a jail infirmary, was incarcerated for a couple of days, and presently is seeking medical attention...."

Mr. Bifield, addressing the court, said: "I'm going through a lot of changes in my head. Okay? I got up, I get dizzy. This morning I had a hard time getting here. It's my fault, I've been sleeping, I've been resting three days. A Court or a Judge ordered me to go to get medical exam, and I was thrown in a room with two other inmates. I was just thrown on a metal bed. Okay? I was really hurting, and I was thrown in. I had to go through all this aggravation for three whole days. And

finally, everybody said, 'Oh, it doesn't look that bad,' and I'm hurt. And boom, then I was released from jail. Oh, yeah."

When the district judge asked Mr. Bifield when he had been released from jail, Mr. Bifield exhibited obvious confusion about what day of the week it was: "I spent Friday? Or what's today? Today is Monday, right? Friday. Thursday?"

The court denied the motion and directed that the trial proceed forthwith. The trial did thereupon go forward to conviction. Mr. Bifield did not testify on his own behalf.

Affirming, the Court of Appeals relied upon the Second Circuit rule that the medical examination provisions of 18 U.S.C. §4244 are discretionary and not mandatory, and that the actions of the district court in this instance, although perhaps incautious, did not rise to the level of an abuse of discretion: "We note in passing that evidence of serious untreated injuries to the head, in general should alert the district court to the probable need for an examination under §4244. Nevertheless, the district court must consider all pertinent

evidence before it in exercising its discretion to determine whether to order an examination under §4244. The district court did that here and we find no abuse of discretion."

REASONS FOR GRANTING THE WRIT

Certiorari Should Be Granted To Resolve A Dispute Among The Circuit Courts Concerning Whether A Competency Examination Is Mandatory Under 18 U.S.C. §4244 When The District Court Receives Evidence That A Criminal Defendant Has Sustained Recent, Serious And Untreated Head Injuries.

Had Mr. Bifield been tried in the Ninth Circuit, a competency examination would have been ordered in this case when the court was informed by defense counsel that the defendant had sustained a recent, serious and untreated head injury which already had prompted a state court judge to order medical treatment. When the issue of competency is raised in the Ninth Circuit, examinations under 18 U.S.C. §4244 are mandatory. Meador v. United States, 332 F.2d 935 (9th Cir. 1964). "It is not within the discretion of the trial

court to deny the examination on the ground that there is no reasonable cause to believe the defendant incompetent." United States v. Ives, 574 F.2d 1002, 1005 (9th Cir. 1978).

The fact that a formal motion under 18 U.S.C. §4244 was not made is irrelevant, because the issue of the defendant's competence to stand trial was clearly presented to the district court. Cf. Lokos v. Capps, 625 F.2d 1258, 1260 (5th Cir. 1980).

Because Mr. Bifield happened to be tried in the Second Circuit, however, the district judge enjoyed wide discretion in deciding whether to order him examined. The Second Circuit holds that the provisions of 18 U.S.C. §4244 are discretionary and not mandatory. Newfield v. United States, 565 F.2d 203 (2d Cir. 1977); United States v. Hall, 523 F.2d 665 (2d Cir. 1975); United States v. Vowteras, 500 F.2d 1210 (2d Cir.), cert. denied 419 U.S. 1069 (1974).

This case presents a clear example of the disparity between the Second Circuit and Ninth Circuit rules, because it is apparent that under any standard more stringent than the Second Circuit's "dis-

cretionary" one the action of the district judge in denying an examination would have been overruled. Even the panel which affirmed his ruling expressed some concern that "evidence of serious untreated injuries to the head" did not prompt the court to order an examination. It affirmed only because it found "no abuse of discretion."

The Second Circuit's interpretation of the statute is plainly incorrect. By its terms, Section 4244 does not give the district court discretion. Whenever the question of competency comes before it, "the court shall cause the accused...to be examined as to his mental condition by at least one qualified psychiatrist, who shall report to the court." (Emphasis supplied.)

The Second Circuit appears to stand alone in affording such wide discretion to district judges on the question of whether to order competency examinations. Although the entry of such orders is not always automatic in other circuits, it is generally held that a motion for competency evaluation must always be granted "unless the motion is frivolous or has not been

made in good faith." United States v. Nichelson, 550 F.2d 502, 504 (8th Cir. 1977), cert. denied 434 U.S. 922, citing Rose v. United States, 513 F.2d 1251, 1255 (8th Cir. 1975); Kenner v. United States, 286 F.2d 208, 211 (8th Cir. 1960); Krupnick v. United States, 264 F.2d 213, 216 (8th Cir. 1959). See also, e.g., United States v. McEachern, 465 F.2d 833 (5th Cir.), cert. denied 409 U.S. 1043 (1972).

In determining whether a motion is frivolous or made in bad faith, trial courts are cautioned in circuits other than the Second to "take great care to eschew the ultimate issue of competency." That issue must not be determined until after the examination has been conducted. United States v. Nichelson, supra, 550 F.2d at 504. As this court has previously observed, a defendant's incompetency "would not necessarily have been apparent to the trial judge." Sanders v. United States, 373 U.S. 1, 20 (1963).

In the present case, there is no suggestion that the competency issue was raised frivolously or in bad faith, and the Court

of Appeals appears to have found to the contrary. Defense counsel stated his claim of incompetency in some detail and gave a specific factual basis for the problem he perceived. He explained that he had a long professional acquaintance with Mr. Bifield upon which he based his observation that the head injury had produced serious mental changes. He made his representations as an officer of the court and noted that only days earlier a state court judge had found the head injuries sufficiently serious to order a medical examination. Mr. Bifield's statements to the court clearly confirmed the probability of incompetency.

Undoubtedly the district judge in this case was irritated that the claim of incompetency was raised at what was to be the opening day of trial. Precisely because such understandable irritation may interfere as it did here with carrying out the statutory intent, it is important to the administration of justice in the federal courts that district judges not be allowed wide discretion in ruling upon motions for competency examinations. As

this court noted in Drope v. Missouri, 420 U.S. 162, 181 (1975): "Even when a defendant is competent at the commencement of his trial, a trial court must always be alert to circumstances suggesting a change...." The Second Circuit rule discourages the trial courts from carrying out this court's mandate in Drope. The Ninth Circuit rule assures that the mandate will be followed, and it should now be adopted formally by this court.

The disagreement among the circuits regarding the mandatory vs. discretionary nature of §4244 examinations is ready for and in need of resolution by the Supreme Court. The issue is of obvious importance to defendants residing within the Second Circuit, but it is also most important to the administration of fair and equal justice in the courts of the United States, because as this court has instructed, the prohibition on trying incompetent persons "is fundamental to an adversary system of justice." Drope v. Missouri, supra.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit.

Respectfully submitted:

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DATED: April , 1981

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixth day of April one thousand nine hundred and eighty-one.

WILLIAM H. TIMBERS,
JON O. NEWMAN,
Circuit Judges,
ABRAHAM D. SOFAER,
District Judge,
Sitting by Designation.

UNITED STATES OF AMERICA,
Appellee,

v. 80,1458, 1460

SUSAN CORIN BOUTON and
DANIEL BIFIELD,
Appellants.

Appeal from the United States District Court for the District of CONNECTICUT.

This cause came on to be heard on the transcript of record from the United

States District Court for the District of CONNECTICUT, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the JUDGMENTS of said District Court be and they hereby are affirmed substantially for the reasons set forth in Judge Cabranes' opinion dated September 9, 1980, to the extent here relevant, supplemented by the following statement of our own.

Appellants, who previously had been convicted of felonies in the Connecticut state courts, were found guilty, following a jury trial, of violating 18 U.S.C. Appendix §1202(a)(1)(1976), which makes illegal the receipt, possession, or transportation in commerce of firearms by convicted felons. From the judgments entered on the jury verdict, appellants have taken this appeal.

Appellant Bifield claims that he was not mentally competent to stand trial and that the district court, having reasonable cause to order a medical examination under 18 U.S.C. §4244 (1976) sua sponte, committed reversible error in failing to do so. Appellant complained of confusion and dizziness at the opening of trial. His

counsel informed the court that he had suffered blows to the head (which apparently remained untreated) one week previously. The district court had colloquy with appellant, who also sought to dismiss his counsel. The transcript shows that appellant was responsive to the court and that he understood the remarks made by his counsel. Moreover, the record shows that appellant engaged in no inappropriate behavior during trial, his counsel did not complain of any difficulty in communicating with him, and no further claim was made of any mental incapacity on the part of the accused. Under these circumstances we hold that appellant was competent to stand trial and that the district court did not commit reversible error. We note in passing that evidence of serious untreated injuries to the head, in general should alert the district court to the probable need for an examination under §4244. Nevertheless, the district court must consider all pertinent evidence before it in exercising its discretion to determine whether to order an examination under §4244. The district court did that here and we find no abuse of discretion.

Both appellants claim that the government's use of a telescope and telephoto lens to enhance the surveillance team's view of appellants' activities carried out behind a large plate glass window of a lighted gas station located on a busy street at night violated their Fourth Amendment rights under United States v. Taborda, 635 F.2d 131 (2 Cir. 1980). We disagree. The government's observations, whether or not made with instruments made to enhance vision, were proper under the circumstances. Appellants took no precautions to manifest their expectation of privacy, nor could they have any reasonable expectation of privacy under the circumstances just mentioned.

Both appellants also object to certain remarks made in the government's summation at trial on the ground that the remarks would encourage jurors to draw adverse inferences from appellants' failure to testify. The prosecutor's statement does not appear to have been fair response to the comments of Bifield's attorney, but in any event it was improper insofar as it referred to the "defendants", thereby

including Bouton. Nevertheless, Judge Cabranes's forceful instructions cured any possibility of prejudice to Bifield and also to Bouton, given the evidence against her.

Finally, appellant Bifield claims that he has not given a reasonable opportunity to respond to the presentence report before sentencing. Since the Local Rules of the Connecticut District Court require presentence reports to be made available two days in advance of sentencing, and since it is known that the government was able to review the report in the day before sentencing, this claim is without merit. In any event, the district court made clear it was not relying on any material which Bifield wanted to challenge.

We have carefully considered all of appellants' claims of error and find them to be without merit. We order that the mandate issue forthwith.

WILLIAM H. TIMBERS/s/
UNITED STATES CIRCUIT JUDGE

JON O. NEWMAN/s/
UNITED STATES CIRCUIT JUDGE

ABRAHAM D. SOFAER
UNITED STATES DISTRICT JUDGE
Sitting by Designation.

APPENDIX B

United States District Court for
DISTRICT OF CONNECTICUT

United States of America vs.

DANIEL BIFIELD

CRIMINAL B-80-11

JUDGMENT AND PROBATION COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date

NOVEMBER 20, 1980

X WITH COUNSEL James Diorio, Esq. and John Williams, Esq.

There being a verdict of X GUILTY, by the Jury on count #1.

Defendant has been convicted as charged of the offense(s) of violation of Appendix, Title 18, United States Code, Section 1202(a)(1) (Possession of firearm by convicted felon) as charged in count #1.

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defend-

ant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of two (2) years.

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extent the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

The court orders commitment to the custody of the Attorney General and recommends, that the defendant not serve term of imprisonment at the same institution as co-defendant.

Jose A. Cabranes/s/
11/20/80